No. 8642.

# In the United States Circuit Court of Appeals

## For the Ninth Circuit.

In the Matter of

DOLORES LOPEZ NUNEZ,

On Habeas Corpus.

WALTER E. CARR, District Director, U. S. Immigration and Naturalization Service, Department of Labor, for Los Angeles District No. 20,

*Appellant,*

*vs.*

DOLORES LOPEZ NUNEZ,

*Appellee.*

## BRIEF FOR APPELLANT, WALTER E. CARR

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DOLORES LOPEZ NUNEZ,

*Appellee.*

---

## BRIEF FOR APPELLANT, WALTER E. CARR

### Opening Statement.

This appeal is taken by the Government from the order of the District Court for the Southern District of California, Central Division, granting a Writ of Habeas Corpus and discharging the alien Dolores Lopez Nunez from the custody of the United States Immigration and Naturalization Service [Tr. of Record, p. 23]. The proceeding arose in the court below by the filing by Dolores Lopez Nunez, appellee herein, of a petition for a Writ of Habeas Corpus praying for her discharge from the cus-

tody of Walter E. Carr, District Director of Immigration and Naturalization Service for the Los Angeles District, the respondent in the court below and the appellant herein.

The certified Department of Labor file, containing the record of the deportation proceedings against Dolores Lopez Nunez has been filed with the clerk of this Court pursuant to stipulation between the parties [Tr. of Record, p. 27]. This file will hereinafter be referred to as the "Immigration Record".

The printed transcript of the proceedings in the District Court will be referred to as "Tr. of Record".

## Statement of Facts of the Case.

Dolores Lopez Nunez, petitioner below and appellee herein, is twenty-nine years old, an alien, a citizen of Mexico of the Mexican race. It seems that she first arrived in the United States in 1915 or 1916 and remained therein until 1919 or 1920, when she returned to Mexico, reentering the United States on December 8, 1922. From that date, up to the 22nd day of August, 1934, she made several trips to Mexico. On August 22, 1934 she entered the United States through the port of San Ysidro, California, after a short visit to Mexico. That is the date of her last entry into the United States. Since 1932 she has been entirely supported at public expense.

The Immigration Record shows that from October, 1932 until May, 1934 she received continuous aid from the State and County Welfare authorities in the sum of $40.00 per month, and that since May, 1934, when one of her children was killed, she received $32.25 per month from the relief authorities. In addition, she has received medical treatment in the Los Angeles County General

Hospital, where she was examined as an out-patient on July 29, 1931; was an in-patient from December 7th to the 16th, 1931; was an out-patient from December 17, 1932 to June 21, 1933; from September 26, 1933 to January 18, 1934 and from June 27, 1934 to October, 1934, all at public expense. Since the latter date the Immigration Record shows she has called more or less regularly at the Los Angeles County General Hospital for examination and treatment. She was a charge upon the public before her departure to Mexico in 1934 and continuously since her reentry on August 22, 1934.

On March 26, 1935 she was examined by an officer of the Immigration and Naturalization Service in regard to her right to be and remain in the United States. Transcript of her statement together with "Medical Certificate", Form 541 ("Proof that Alien Has Become a Public Charge" and "Clinical History"), Exhibit "B" and Exhibits "C" and "D", relating to appellee's admission to the United States on December 12, 1922 and on August 22, 1934 [see Immigration Record], were forwarded to the Department of Labor, Washington, D. C., and on the 25th day of May, 1935 the Assistant to the Secretary of Labor caused his warrant to be issued directing that appellee be taken into custody and given a hearing to show cause why she should not be deported from the United States. Appellee was taken into custody under said warrant and notified of the charges and the nature of the proceedings and thereupon released upon her own recognizance and she is still at large. Hearings were then

granted appellee under said warrant and she was at all times represented by counsel of her own selection. At the request of her counsel the hearing was continued from time to time and finally, on the 4th day of March, 1936, it was concluded and the complete transcript of the record was forwarded to the Department at Washington, D. C. After a careful review of all the evidence of record by a Board of Review, the Assistant to the Secretary of Labor, on June 29, 1936, issued his warrant directing the deportation of the appellee to Mexico, having found from the evidence that she was subject to deportation under section 19 of the Immigration Act of February 5, 1917, being subject thereto in that

(1) "She was a person likely to become a public charge at the time of entry", to-wit, August 22, 1934; and

(2) "She became a public charge within five years after her entry into the United States from causes not affirmatively shown to have arisen subsequent thereto."

After the issuance of the warrant of deportation, the Department reconsidered its decision at the request of appellee's counsel and on the 30th day of July, 1936 it affirmed its previous decision. Appellant was preparing to execute the warrant of deportation when the Writ of Habeas Corpus was issued in the lower court. After a hearing, the court sustained the writ and discharged appellee from the custody of the Immigration and Naturalization Service.

## Specifications of Error.

The specifications of error relied upon by appellant are as follows:

Specification I: The Court erred in granting the Writ of Habeas Corpus and discharging said Dolores Lopez Nunez from the custody of the Immigration and Naturalization Service [Assignments 1 and 4, Tr. of Record, p. 26].

Specification II: The Court erred in holding and deciding that the deportation of said Dolores Lopez Nunez was violative of due process of law and contrary to the public policy of the United States [Assignments 2 and 3, Tr. of Record, p. 26].

Specification III: The Court erred in holding and deciding that the said Dolores Lopez Nunez was ordered deported as a result of an abuse of discretion [Assignment 2, Tr. of Record, p. 26].

## Issues of the Case.

One point of law, and only one, is involved in the determination of this appeal, namely:

WAS THE ORDER OF DEPORTATION VIOLATIVE OF DUE PROCESS AND A RESULT OF AN ABUSE OF DISCRETION?

## ARGUMENT.

The Court below found and held that under the facts and the law the immigration authorities were justified in finding that the appellee was subject to deportation on the grounds specified in the deportation warrant [Supp. Tr. of Record, p. 4]. Having so found and held, it is the contention of appellant that there was no ground for judicial intervention and that the lower Court erred in granting the writ and discharging appellee.

The facts established in the deportation proceedings were sufficient to bring the appellee within the classes of aliens whose deportation is directed by law.

Under the provisions of the Immigration Act of February 5, 1917 (8 U. S. C. A. 155), deportation is directed of any alien who at the time of entry was a member of one or more of the classes excluded by law. Among the classes of aliens excluded from admission into the United States by section 3 of the same Act (8 U. S. C. A. 136), are "persons likely to become a public charge". See:

*Gegiow v. Uhl,* 239 U. S. 3;

*Lam Fung Yen v. Frick,* 233 Fed. 393 (cert. denied, 242 U. S. 642).

The Immigration Act also provides for the deportation of an alien who, within five years after entry, becomes a public charge from "causes not affirmatively shown to have arisen subsequent to landing". Section 19 of the Act (8 U. S. C. A. 155), provides:

> "That at any time within five years after entry any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * *any alien who within five years after entry becomes*

> *a public charge from causes not affirmatively shown to have arisen subsequent to landing;* * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported; * * *. *In every case where any person is ordered deported from the United States under the provisions of this act, or any law or treaty, the decision of the Secretary of Labor shall be final.*" (Italics ours.)

Appellee's entry on August 22, 1934 is the entry upon which the deportation order is based and the one which comes within the scope of the law. Both grounds upon which the order of deportation was based are conclusively established by the evidence of record in the Immigration Record, and it was so found and held by the Court below. But the lower Court, in addition, found and held [Supp. Tr. of Record, p. 2], that

> "the deportation of this Mexican woman at this time would be violative of due process of law and contrary to the public policy of the United States as declared in decisions of the Supreme Court. See *Pierce v. Society of Sisters,* 268 U. S. 534; *Meyer v. Nebraska,* 262 U. S. 399."

## Was the Order of Deportation Issued as a Result of an Abuse of Discretion?

Appellant contends that it was not and that the Court erred in so holding.

The Immigration Act of February 5, 1917 (8 U. S. C. A. 136), as did the prior Act of February 20, 1907 (34 U. S. Stat. at L., p. 899, c. 1134), in express terms provides for the deportation of aliens likely to become public charges at the time of entry. The Immigration

Act of 1917 (8 U. S. C. A. 155), also provides that in every case where any person is ordered deported from the United States under the provisions of that Act, the decision of the Secretary of Labor shall be final. The Department of Labor, as well as the courts, are obligated to carry out the will of Congress as expressed in the Immigration Act. It is not within the province of the Department to exercise its own notion as to the policy or justice of the legislation. Congress has given no discretion to the Department to withhold the deportation of any alien who the law directs should be deported. Having no discretion to exercise after it has found from the facts that an alien is, under the law, subject to deportation, how can it be said that the Secretary abused his discretion in ordering this alien deported. The cases are legion holding that the action of a duly authorized administrative or executive officer in directing the deportation of an alien, after a fair hearing, is final and conclusive if there is evidence to support the decision and there has not been an application of an erroneous rule of law, and the courts will not disturb such decision:

*Akiro Ono v. U. S.* (C. C. A. 9), 267 Fed. 359;

*Ex parte Saadi* (C. C. A. 9), 26 Fed. (2d) 458 (cert. denied, 278 U. S. 616);

*Kumaki Koga v. Berkshire* (C. C. A. 9), 75 Fed. (2d) 820 (cert. denied, 295 U. S. 757).

The Court below did not find, nor hold, that appellee was denied a fair hearing or that there was insufficient evidence to support the decision or that there was an erroneous application of law. But it held that the deportation of this alien would be violative of due process of

law and as a result of an abuse of discretion [Tr. of Record, p. 23].

It is submitted that the finding of the lower Court that under the facts and law the immigration authorities were justified in issuing the warrant of deportation is inconsistent with the finding and holding that the alien's deportation would be violative of due process of law [Supp. Tr. of Record, p. 4].

## Is the Deportation of Appellee Violative of Due Process of Law?

The power to exclude and deport aliens from the United States is a political power vested in the political departments of the Government to be exercised in accordance with the acts of Congress by the executive branch of the Government. Congress has committed the enforcement of the immigration laws to the Department of Labor. These principles are firmly established by the decisions of this Circuit Court and the Supreme Court of the United States:

*Akido Ono v. U. S. supra;*

*Ex Parte Saadi, supra;*

*Kumaki Koga v. Berkshire, supra;*

*Bilokumsky v. Tod,* 263 U. S., 149, 44 S. Ct. 54;

*Ng Fung Ho v. White,* 259 U. S. 276, 42 S. Ct. 492;

*United States ex rel. Turner v. Williams,* 194 U. S. 279, 24 S. Ct. 719;

*Fong Yue Ting v. United States,* 149 U. S. 698, 13 S. Ct. 1016.

And, except where there has been a denial of a fair hearing, or where a finding was not supported by the evidence, or where there has been an erroneous application of a rule of law, the findings of the immigration authorities are conclusive on the courts and the courts will not interfere:

*Kumaki Koga v. Berkshire, supra;*

*Kenmotsu v. Nagle* (C. C. A. 9), 44 Fed. (2d) 953, (Cert denied, 295 U. S. 757).

In the case at bar the alien was not denied a fair hearing. The finding of the immigration authorities was supported by the evidence and there was no erroneous application of a rule of law and the lower court so found. It was held in:

*Murray's Lessee v. Hoboken Land & Improvement ment Co.,* 59 U. S. 272, 280, 281, 283,

that:

> "Though 'due process of law' generally implies and includes actor, *reus, judex,* regular allegations, opportunity to answer and a trial according to some course of judicial proceedings, yet this is not universally true;"

and that:

> "Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both."

It was decided in that case to be consistent with due process of law for Congress to provide summary means to compel revenue officers—and in case of default, their sureties—to pay such balances of the public money as might be in their hands. It has long been settled that the power to

exclude or expel aliens belongs to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to remain in this country depended, is "due process of law" and no other tribunal, unless expressly authorized to do so, is at liberty to re-examine the evidence on which he acts. See:

*Fong Yeu Ting v. U. S., supra;*

*Nishimura Ekiu v. United States,* 142 U. S. 651;

*Mahler v. Eby,* 264 U. S. 32.

In the case at bar there was no hasty, arbitrary or unfair action on the part of any official, or any abuse of discretion. The procedure prescribed by the rules of the Department were followed in every respect and the legality of that prescribed is not questioned. The hearing was conducted orally and transcribed. The alien was present and represented by counsel. She was given ample time in which to present evidence, argument and a brief. Under these circumstances how can the holding of the lower court that the deportation of this Mexican alien is violative of due process of law be upheld?

The hearings under the warrant were properly conducted with regard to the rights of appellee and the evidence is sufficient to establish that appellee is subject to deportation. Certainly under the rule of the *Bilokumsky v. Tod* case, *supra,* the proceedings were in accordance with due process of law.

## Is the Deportation of Appellee Contrary to the Public Policy of the United States?

The lower court held that the deportation of this Mexican alien is contrary to the public policy of the United States [Supp. Tr. of Record, p. 2]. Appellant contends that it is not and that the lower court erred in so holding.

The United States has plenary powers to admit, exclude, or deport aliens, absolutely or upon any condition it cares to make. Such right is inherent in sovereignty and inalienable; it may be exercised in war and peace, and is essential to the safety, independence, and welfare of its citizens. These principles are so firmly established that they are no longer seriously questioned. They have been repeatedly asserted by the Supreme Court of the United States:

*Bilokumsky v. Tod, supra;*
*Ng Fung Ho v. White, supra;*
*Turner v. Williams,* 194 U. S. 279;
*Fong Yue Ting v. United States, supra.*

Congress, in express terms, has provided for the deportation of aliens "likely to become public charges," or who have "become public charges within five years after entry from causes not affirmatively shown to have arisen subsequent thereto" (8 U. S. C. A., Secs. 136 and 155). The deportation of such aliens is mandatory. The statute makes no exception and the Department of Labor, in which Congress has reposed the power to enforce and execute the laws, *has no discretion.* It is bound to carry out the will of Congress. "The judicial department can not properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in

the exercise of the powers confided to it by the Constitution over the subject * * *" of the exclusion or expulsion of aliens:

*Nishimura Ekiu v. United States, supra;*

*Ng Fung Ho v. White, supra;*

*Bilokumsky v. Tod, supra;*

*Turner v. Williams, supra;*

*Li Sing v. United States,* 180 U. S. 486.

In the case last cited, the Supreme Court used this pertinent language:

> "* * * We can but repeat what was said in similar appeals in the case of Fong Yue Ting v. United States (149 U. S. 698), above cited: *'The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political department of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or justice of the measures enacted by Congress in the exercise of the powers confided to it, by the constitution over this subject'.*" (Italics ours.)

For many years it has been the express policy of the United States to exclude and expel aliens likely to become charges upon the public. The reason therefor is obvious and need not be discussed here. As early as 1882 Congress provided for the exclusion of aliens likely to become public charges (Act of August 3, 1882, Sec. 2 (22 Stat. 214)), and by the Act of October 19, 1888 (25 Stat. 566), it authorized the Secretary of the Treasury to take into custody and deport, within a period of one year after entry, any alien who had been allowed to land contrary

to the prohibition of the law. The exclusion and deportation of such aliens was reenacted in the Act of February 20, 1907 (34 Stat. 898), section 20 of which provided:

> "That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall upon the warrant of the Secretary of Labor be taken into custody and deported * * *."

In arriving at its decision the lower court considered the fact that appellee has three minor American-born children. There is a hardship involved in every deportation case, but that is a matter for the legislative branch of the Government to consider, for, as stated by this Honorable Court in the case of:

> *Kenmotsu v. Nagle, supra:*
>
> "The right of the courts to review the action of the department having the authority to adjudge the facts extends only so far as to determine that the warrant of deportation was not arbitrarily issued, or issued as the result of an unfair hearing. Tisi v. Tod, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590; Bilokumsky v. Tod, Commissioner, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221."

and where the alien is otherwise subject to deportation the Court may not consider the hardship necessarily involved in deporting him:

> *United States ex rel. Cerami v. Uhl* (D. C., N. Y.), 9 Fed. Supp., 887 (Reversed on other grounds, 78 Fed. (2d) 698);
>
> *Ex Parte Garcia,* 2 Fed. Supp. 966 (D. C. Tex.).

In the case last cited the alien involved was 26 years of age and had resided in this country since she was six months old. She was married and had one American-born child and a dependent mother; had never been to Mexico except for two months in 1913, and had no friends or close relatives there. It was alleged that her deportation would deprive her American-born child of the mother's care and that it would become a public charge. The Court, in considering these matters, said:

> "* * * But under the law, what shall be done under such circumstances is not for the court, but exclusively for the Secretary of Labor, to determine. His determination is final, and not subject to review by the courts in a habeas corpus proceeding. Whether petitioner will present the matter further to the Secretary of Labor is for her to decide."

And, in:

*Cerami v. Uhl, supra,*

the Court said:

> "The court may not consider the hardship to the alien necessarily involved in deporting him where he is otherwise subject to deportation. The court may not consider the fact that the alien whose deportation is directed has resided in this country for many years, that other members of his family were born here, and that deportation will be tantamount to exile from a country in which the alien has always lived to a country in which he will be a stranger."

And this Honorable Court, in the case of:

*Ex Parte Vilarino,* 50 Fed. (2d) 582,

affirmed the decision of the lower court (47 Fed. (2d) 912), remanding the alien to the custody of this service for deportation, even though it was shown that Vilarino was married and had *eleven children,* all born in this country.

Appellant is not unmindful of the situation in which the appellee here finds herself, but the law is clear and both the Department of Labor and the courts are bound by the will of Congress. Also, as said by the Supreme Court in the case of:

*Li Sing v. United States, supra:*

"* * * The order of deportation is not punishment for a crime. It is not a banishment, in the sense in which that word is often applied to the exclusion of a citizen of a country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper department, has determined that his continuing to reside here shall depend. *He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the constitution securing the right of trial by jury, and prohibiting searches and seizures, and cruel and unusual punishments, have no application.*" (Italics ours.)

In:

> *Costanzo v. Tillinghast,* 287 U. S. 341; 53 S. Ct. 152; 77 L. Ed. 530,

the Supreme Court stated:

> "The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the Department charged with its enforcement, creates a presumption in favor of administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor."

The Department of Labor has uniformly insisted that where the facts bring any alien within the provision of the law which directs deportation it has no discretion but to carry out the intent and will of Congress. It will take but a moment's reflection to determine that if the United States is barred from giving full force and effect to the provision of the law which directs the deportation of the alien involved in the case at bar, it would practically nullify the deportation provision of the immigration laws in those cases where some member of an alien's family is born in this country. Thus the practice of the Department for over half a century would have to be abandoned and our Government placed in a position of impotence to afford relief and protection to the great body of our citizenship for whose welfare and protection the immigration laws were enacted.

## Conclusion.

It having been determined from the facts that Dolores Lopez Nunez is subject to deportation under the law; that she was given a fair hearing; that there was no erroneous application of the law, and that the warrant of deportation was not arbitrarily issued, appellant respectfully contends that the Court below erred in granting the Writ of Habeas Corpus and ordering the appellee discharged from the custody of the Immigration and Naturalization Service.

Respectfully submitted,

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